

## DEPARTMENT OF STATE REVENUE

04-20130696.LOF

**Letter of Findings Number: 04-20130696**  
**Use Tax**  
**For Tax Years 2008-10**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUES****I. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the assessment of use tax.

**II. Tax Administration—Negligence Penalties.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalties.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state merchant with operations in Indiana. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for the years 2008-10. The audit resulted in the assessment of additional use tax, negligence penalties, and interest for the years at issue. Taxpayer protested the imposition of use tax on certain items and the assessment of the negligence penalties. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented as required.

**I. Use Tax—Imposition.****DISCUSSION**

Taxpayer protests a portion of the proposed use tax assessments for the tax years 2008, 2009, and 2010. Due to the large volume of Taxpayer's invoices, the Department assessed additional use tax based on a statistical sampling of certain invoices. The sample invoices were categorized into five different strata based on dollar amounts. The Department reviewed certain purchases and imposed use tax on items of tangible personal property ("TPP") upon which sales tax had not been paid at the time of purchase. These purchases were then used to determine statistical rates by which to impose use tax. Taxpayer protests that some of the items listed as taxable in the Department's calculations were actually exempt from use tax. Taxpayer argues that the Department erred in assessing use tax on transactions it entered into with certain vendors on the grounds that the transactions involved supply and building services. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when TPP is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction, or if there is an applicable exemption to sales and use taxes. A transaction subject to the state's sales tax necessarily involves the transfer of TPP. The state's use tax is triggered when a person exercises ownership over TPP.

Taxpayer protests the imposition of use tax on the transactions it had with three vendors. Regarding Taxpayer's transactions with Vendor 1, Taxpayer protests that Vendor 1 is an Indiana registered retail merchant and that all sales tax due at the time of the transactions was paid. Taxpayer has provided invoices that were not available during the audit that prove sales tax has already been paid. Pursuant to [45 IAC 2.2-3-4](#) no use tax is due on those transactions since the state gross retail tax had been collected at the point of purchase. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving the proposed assessment wrong.

Regarding the transactions of Vendor 2, Taxpayer protests that Vendor 2 is an Indiana company that provided building services which are not subject to sales or use tax. A retail transaction is defined as occurring when a person "acquires tangible personal property. . . and transfers that property to another person for consideration." IC § 6-2.5-4-1(b)(1)-(2). During the hearing, Taxpayer provided service contracts and service descriptions to show that TPP was not acquired. Therefore, no sales or use tax is due on those transactions. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving the proposed assessment wrong.

Regarding the transactions of Vendor 3, Taxpayer protests that Vendor 3 is an Indiana company that provided concrete services which are not subject to sales or use tax. A retail transaction is defined as occurring when a person "acquires tangible personal property. . . and transfers that property to another person for consideration." IC § 6-2.5-4-1(b)(1)-(2). During the hearing Taxpayer provided invoices and service descriptions to show that TPP was not acquired. Therefore, no sales or use tax is due on those transactions. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving the proposed assessment wrong.

In conclusion, Taxpayer has met the burden imposed under IC §6-8.1-5-1(c) of proving the proposed assessments wrong regarding the protested items. Taxpayer has provided invoices, service contracts, and service descriptions to support its protests. Taxpayer is sustained subject to audit verification. The Department will conduct a supplemental audit to verify the amounts entered.

## FINDING

Taxpayer's protest is sustained subject to audit verification.

## II. Tax Administration - Negligence Penalties

### DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalties pursuant to IC § 6-8.1-10-2.1. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case. Taxpayer's protest is in regards to the Department's assessment of the negligence penalties. Taxpayer has affirmatively established that it exercised ordinary business care in this case. Therefore, waiver of penalty is warranted under [45 IAC 15-11-2\(c\)](#).

#### **FINDING**

Taxpayer's protest to the imposition of the negligence penalties is sustained.

#### **SUMMARY**

Taxpayer's Issue I protest regarding the imposition of use tax on transactions with vendors 1, 2 and 3 is sustained subject to audit verification. Taxpayer's Issue II protest regarding the imposition of negligence penalties is also sustained.

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